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Supreme Court of the United States

October Term, 1956

No. 282

ROSA MAYER, as Administratrix of Benjamin Mayer,
Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under a certain agreement made on September 1, 1903, by and between the WESTERN PACIFIC RAILWAY COMPANY and the BOWLING GREEN TRUST COMPANY, WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Defendants,

and

THE PEOPLE OF THE STATE OF NEW YORK,
Intervening Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To the Honorable: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the intervening defendant-respondent, The People of the State of New York, by its counsel of record, and opposes the petition herein and asks that the same be denied.

Statement of the Case

Petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (p. 5a, Appendix B to Petition)*.

That judgment reversed a judgment of the District Court for the Southern District of New York, which had permitted the Chase National Bank of the City of New York, as Trustee of a trust created by a trust agreement, to deviate from the terms of the agreement with respect to the distribution of certain moneys remaining in its hands unclaimed and which had directed the distribution of such moneys to the plaintiff and other known bondholders pro rata.

The Court of Appeals, reversing the District Court, remanded the action for consideration of the claim of the State of New York that the fund became abandoned property under Section 300(1)(a)(v) of the New York Abandoned Property Law.

The Facts

The Action; the Decision of the District Court

The suit is in the Federal courts by reason of diversity of citizenship, plaintiff being a citizen of the State of Maryland, and defendant Trustee a New York Corporation.

The action is for a declaratory judgment and instructions to the Trustee under a trust agreement securing bonds issued by the Western Pacific Railway Company, as

*In appendices to the petition for certiorari, are printed the judgments and opinions of the courts below in the instant case. References in this brief to these judgments and opinions will be made to them at the pages of such appendices.

to the distribution of a fund held by the Trustee in the amount of $21,893.15. The fund is the unclaimed balance of distributions to bondholders from proceeds of a money judgment recovered by the Trustee against the guarantor of the bonds. The rightful bondholders, to whom this balance would go, are unknown. The fund is not now and never has been in the custody of the Court. The District Court directed that the fund be distributed to plaintiff and other known bondholders according to their pro-rata share, after payment of necessary costs incident to the present suit. This was a deviation from the terms of the trust agreement.

The Attorney General of New York intervened on behalf of The People of the State of New York, contending that the unclaimed moneys were abandoned property under Section 300 of the Abandoned Property Law of the State of New York.

The Court of Appeals Decision

The Court of Appeals reversed the District Court.

It held:

> Since plaintiff and other known bondholders had already received their full pro-rata share of the moneys, they are not entitled by the terms of the trust to any further participation in the fund (p. 2a).
>
> This being a case where Federal jurisdiction rests on diversity of citizenship, it must be decided in accordance with New York law, and the law of New York bars further distribution to known bondholders (pp. 2a-3a).
>
> Since the fund should not be turned over to the known bondholders, the cross-claim of the State of New York for the fund as abandoned property should be considered by the District Court on remand (p. 4a).

ARGUMENT

POINT I

The jurisdiction of the Federal courts in this action being based upon diversity of citizenship, the Court of Appeals properly, under the principle and policy laid down by this Court, applied the law of the State of New York. The New York decisions, in which the law of the State on the issue involved in the action has been declared, were correctly accepted as authoritative, the aspects which petitioner criticizes having no diminishing effect thereon.

This action, in which the Federal court's jurisdiction rests upon diversity of citizenship, relates to the rights of bondholders under an express trust agreement (Op. of Court of Appeals, p. 4a, Appendix A). Such being the case, the State law on the issue involved in the action is to be applied by the Federal courts. The question, therefore, upon this petition is whether petitioner raises such a question in respect to the propriety of the Court of Appeals applying the law of New York as declared in two decisions of the courts of New York, as to warrant this Court's granting the petition. Petitioner objects to the Court of Appeals following the New York decisions because they were rendered by the Supreme Court of the State, which is not the State's highest court, were not published in the Reports and their context did not, on the face, set forth the facts as fully as petitioner would have them.

Since *Erie R. Co.* v. *Tompkins* (304 U. S. 64), it is established law that where the jurisdiction of the Federal court in a case rests upon diversity of citizenship, the question before the court is to be decided in accordance with the law of the State. *Erie R. Co.* v. *Tompkins* "ex-

pressed a policy that touches vitally the proper distribution of judicial power between State and federal courts" (*Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109). As Mr. Justice Frankfurter, in the latter case, explained the policy:

> "In essence, the intent of that decision [*Erie R. Co.* v. *Tompkins*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." (*ibid.*)

From this, it flows that the law of the State, whether enunciated by its highest court or by a court below that level, is to be followed by the Federal court. And so this Court holds. Petitioner's argument here—that the Court of Appeals should not have followed the law of the State of New York because the pertinent cases had been decided by the Supreme Court of the State, which is not the State's highest court—is counter to what this Court holds as natural corollary to the principle of *Erie R. Co.* v. *Tompkins;* i. e., that the Federal courts are to accept State law as enunciated by the State courts other than a State's highest court:

> *Fidelity Trust Co.* v. *Field*, 311 U. S. 169;
> *Six Companies* v. *Highway Dist.*, 311 U. S. 180;
> *West* v. *A. T. & T. Co.*, 311 U. S. 223;
> *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464.

The theory of why this Court holds State court decisions binding upon the Federal courts, although not ren-

dered by the State's highest court, is set forth in these cases. From the opinions of Chief Justice Hughes, Justice Stone and Justice Murphy, this theory can be summed up to be this: "A state is not without law save as its highest court has declared it." (*West* v. *A. T. & T. Co.*, 311 U. S. 223, 236). There are many rules of decision which are the laws of the State, although the highest court has never passed upon them. A Federal court is "not free to reject the state rule" merely because it has not been enunciated by the State's highest court. It is not for a Federal court to, in effect, overrule a decision of a State court. Until the highest State court has done that, the law of the State, as decided by courts of lower levels, is to be followed by the Federal court.

There are two decisions in New York State which have declared the law on the issue in this case. Were there but one, the Federal court would, of course, be required to follow it. One New York case on the subject was decided nearly seven years ago and there has been no decision since then differing with it. On the contrary, it has been followed within the State as the law on the subject. The decision is *Moskovitz* v. *Briskman* (p. 26a, Appendix F). It is a decision of the State Supreme Court, which is the highest court of first instance in the State. The Justice who decided it has since been designated to the State's intermediate appellate court, the Appellate Division. His decision was unanimously affirmed by the Appellate Division, without opinion (278 N. Y. App. Div. 761). A case in which the *Briskman* case was followed is *In Re Continental Bank & Trust Co.* (p. 28a, Appendix B). That, too, is a decision of the New York State Supreme Court and the Justice who decided that case, affirming the report of the Referee, has also been designated to the Appellate Division. Parts of the Referee's opinion are printed as an appendix to this brief.

As to petitioner's dwelling upon the fact that the decisions of the Supreme Court in these cases are not reported, the situation is that in New York State decisions of courts below the appellate courts are not automatically published in the Reports, and relatively few opinions of the State Supreme Court are published in the Reports. The point need not be labored that with full opinions or not, reported or not, the decisions which the Court of Appeals followed are the adjudications laying down the law of New York State on the issue and those cases were indistinguishable from the case at bar (p. 3a, Appendix A).

Conclusion

There is nothing in this case that would make it one for review by this Court.

Actually, there is here involved something less than $17,000, virtually all of which would go to one railway corporation, and the remaining $80 would go to some dozen bondholders, in amounts ranging from 35 cents to $10.50. The other $5,000 of the $21,649 fund would be absorbed in attorneys' fees and in costs.

In fact, this trust agreement, under which the bonds involved in this action were issued, was construed in 1925 in *Drascovich* v. *Equitable Trust Co. of N. Y.*, 3 F. (2d) 724, 9 Cir., to require payments to be made severally to bondholders in proportion to their holdings. The *Drascovich* case rejected the contention that the proceeds of the foreclosure of the trust mortgage constituted an "undistributed common fund"; and also rejected the claim that the pro-rata share of absent bondholders could be invaded on behalf of other bondholders (*cf.* District Court Op., Appendix C, p. 9a). (When, in 1953, the District Court in California ordered the balance of the fund

there distributed to bondholders pro rata, it was upon an order obtained on default [Record filed in Court of Appeals, pp. 107-108].)

As to the question of the application by the Court of Appeals of the decisions of the New York State Supreme Court, that question is already definitively settled by this Court. The Federal case to which petitioner points as inconsistent with the decision of the Court of Appeals in the present case, *Louisville & Nashville R. R. Co.* v. *Robin*, 135 F. (2d) 704, was cited to and considered by the New York State Supreme Court in *Moskoritz* v. *Briskman* and *In Re Continental Bank & Trust Co.* and found to be factually distinguishable from the situations in those cases, to which the present case is akin (Op. of Court of Appeals, p. 3a, Appendix A).

THE WRIT OF CERTIORARI PETITIONED FOR HERE SHOULD BE DENIED.

Dated: August 10, 1956.

Respectfully submitted,

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Appendix

In Re Continental Bank & Trust Co.
Excerpts From
Opinion of Referee
May 6, 1954

Affirmed, Supreme Court, Mr. Justice Rabin
July 21, 1954

"A bondholder, Ethel Lichtentag, argues that such unclaimed funds less expenses and fees belong to the Midtown bondholders of record who have been located and that a secondary distribution should be made to them on the authority of *Louisville & Nashville R. R. Co.* v. *Robin*, (135 Fed. 2d 704).

"The Attorney General of the State of New York, who was asked to intervene at the Referee's request after claims had been asserted to the fund by the stockholders and bondholders, contends that such money should be paid to the State Comptroller as abandoned property on the theory of *bona vacantia*. Alternatively, he has requested that the sum be paid over to the State Comptroller pursuant to Section 1310 of the *Abandoned Property Law*, which reads as follows:

> 'Any person who holds property belonging to any other person, which property has remained unclaimed for a period of six years by the person or persons appearing to be entitled to receive such property, may apply to the supreme court upon fifteen days' notice to the state comptroller for an order declaring such property to be abandoned and directing the payment of such property to the state comptroller, if the comptroller shall elect to receive the same. Upon payment of such property to the state comptroller pursuant to such order, the former holder of the property shall be relieved of any and all liability in connection therewith.'

* * *

"A trust does not become a prize by lapse of time or operation of law.

* * *

"The funds in the possession of the Trustee are trust funds for the benefit of the individual bondholders. (*Moskoritz* v. *Briskman*, Opinion of Judge Botein, N. Y. L. J., February 17, 1950, aff'd without opinion, 278 A. D. 761; *Rogers Locomotive &c. Works* v. *Kelly*, 88 N. Y. 234; *Brown* v. *Morgan Co., Inc.*, 265 App. Div. 631, aff'd without opinion, 295 N. Y. 867; *Schneider* v. *Nat. City Bank*, 180 Misc. 426).

* * *

"Since the Indenture created in each bond a right to a pro rata distribution of the fund, such a right does not attach to the bonds as a class any more than it does to its stock as a class. Nor are the unclaimed moneys common funds payable to a class. They belong to all the bondholders severally in proportion to their holdings. (*Moskoritz* v. *Briskman, supra; Drascovich* v. *Equitable Trust Co. of New York*, C. A. 9th Cir., 1925, 3 Fed. 2d 724; *Brown* v. *Pennsylvania Canal Co.*, 274 Fed. 467, aff'd 279 Fed. 419; *In re Colonial Trust Company*, Memorandum by Judge Rabin, N. Y. L. J., March 5, 1954.)

"The provisions of the Indenture in the case at bar precluded any transfer of this money to other bondholders. This right is part of the contract with the bondholders: the Trustee has a special relationship of trust with each bondholder, known or unknown, in respect to the sum so allocated. The money belonged to them severally, and the improbability of locating them does not authorize the taking of the funds of one bondholder by another. (*Guaranty Trust Co. of N. Y.* v. *Newark & Hackensack Traction Co.*, 136 N. J. Equity 159).

"Various cases have been cited under the federal Bankruptcy Act (Sec. 66B U. S. C. A., Sec. 106(b)) where distribution of unclaimed dividends has been made to creditors not paid in full. It is also argued that the Debtor & Creditor Law (Sec. 160, 198) provides for such distribution. But the judicial function is to construe the law not construct it and in the absence of statutory authority applicable to the particular case, legal and equitable principles must govern. Those principles preclude a secondary distribution to bondholders.

"*Louisville & Nashville R. R. Co.* v. *Robin* (*supra*) is inapplicable here. In that case funds lay dormant for 63 years. The court's choice lay between holding that the fund should go to the federal government or to the known bondholders. Relying on *American Loan & Trust Co.* v. *Grand Rivers Co.*, (159 Fed. 775) which had held that the United States is not entitled to ownerless property and that 'if any government can claim to be *parens patriae*, it is that of the state, and not of the nation,' the court held that the funds should go to the remaining bondholders as a class.

"But the bondholders here are several not a class, the terms of the Indenture preclude such distribution, the funds can hardly be considered abandoned, and if and when they are the state is a very real claimant as a sovereign and custodian—in contrast to the dubious claim of the federal government in the *Robin* and *Grand Rivers* cases."